KOPERASI NESA PELBAGAI BHD

v.

MAIKA HOLDINGS BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NOS: D8-22-1278-2007 & D8-22-1363-2007]
10 MARCH 2008

CIVIL PROCEDURE: *Injunction - Application for - Order to restrain defendant from implementing resolutions purportedly passed at company's annual general meeting - Shareholder's right to attend, speak and vote - Sale of shares - Whether approval of members must be obtained under s. 132C of the Companies Act 1965 - Balance of justice - Whether lay in favour of maintenance of injunction - Companies Act 1965, s. 148*

COMPANY LAW: *Members' rights - Shareholders - Companies Act 1965, s. 148 - Right to attend, speak and vote at general meeting - Sale of shares - Whether approval of members must be obtained under s. 132C of the Companies Act 1965 - Whether a denial of plaintiff's right to speak and vote constitutes fundamental breach*

In both the enclosures in the two suits, the parties were seeking the common reliefs (i) an order to restrain the defendant from acting on, implementing or giving effect to the resolutions purportedly passed at the defendant's 24th Annual General Meeting held on 30 August 2007; (ii) an order to restrain the defendant from selling/and or disposing the defendant equity interest in Oriental Capital Assurance Berhad to Salcon Berhad and/or any other party pending the disposal of the action; (iii) an order to restrain the defendant from entering into, proceeding with proceeding and concluding a share sale agreement with Salcon Berhad as proposed by Resolution 4 of the Proposal Resolutions and/or any other party pending the disposal of the present action (iv) an order to restrain the defendant from disposing, dissipating, selling and/or transferring the entire assets of the defendant as proposed and purportedly passed as Resolution 5 of the Proposed Resolutions. The plaintiff's case was premised on the allegation that it had been denied fundamental right to speak, propose amendments and vote at the meeting by reason that the person representing it had been subjected to physical abuse, assault and oppression. According to the plaintiff, the right of a member of a

company is a fundamental right, the breach of which is not merely a procedural irregularity of no consequence. This right in s. 148(1) of the Companies Act 1965 is not subject to the majority and a breach of this rule cannot be compensated by damages. According to the plaintiffs, the defendant company was not a mere trading company as its purpose was to secure the economic advancement of Malaysian Indians by increasing their level of participation in the equity ownership of the corporate sector. The plaintiffs submitted that balance of justice should be in favour of the plaintiff in granting the injunction because the OCAB shares held by the defendant constituted the core asset of the defendant and therefore the defendant was obliged to seek approval at a general meeting pursuant to s. 132C of the Companies Act 1965. The defendants, however, pointed out that even if the plaintiffs had been denied as they claimed of their voting rights, the resolutions would still have been carried out by sheer force of the majority. According to the defendants, it needed the money from the sale of the OCAB shares that it held to pay off its debt and if prevented from doing so there could be serious irreparable damage, namely the defendant could be wound up by the creditor, or a creditor could attach and sell the OCAB shares and thereby causing the defendant to miss the opportunity to sell at the optimum price. The defendants submitted that the balance of convenience fell in favour of not granting or further withholding this *ex parte* injunction because the vast majority of the shareholders had voted for the sale of the shares and the eventual return of the monies to the shareholders and that by the grant of this injunction, there would be considerable delay in the return of this money to the shareholders against the plaintiff's right to speak and vote at some reconvened AGM.

Held:

(1) Under s. 148 of the Companies Act 1965, as shareholder of the defendant company, Maika, the plaintiff had an unalienable and absolute right to attend, to speak and to vote at the general meeting convened for the purpose of seeking the approval of members of the company to sell the OCAB shares which must be obtained under s. 132C of the Act. The balance of justice lay in favour of maintaining the injunction – for to disallow it would tantamount to condoning an improper and illegal act of the defendant against the legal right of the plaintiff to speak and vote at the meeting. (paras 14 & 18)

(2) The sale of the shares was but a means to the fulfillment of the objective and for that reason a debate on the pros and cons as to whether they should be sold was of paramount importance. It would afford the dissenting member no matter how insignificant his holding was to put forth his view and to enter into an open discussion on the merits and demerits of the proposed sale and possibly to explore other ways and means to overcome the debt problem of Maika. A denial of the right of the plaintiff to speak and vote if proven under the circumstances constitutes a beach so fundamental that overrides all other considerations that the defendant may be able to advance in favour of discharging the injunction. (paras 20 & 21)

[Order accordingly.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Dato Mohd Tahir Abdul Rahim & Ors v. Sharikat Permodalan Kebangsaan Bhd & Ors [1991] 2 MTC 122 ***(refd)***

Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd [1995] 1 LNS 317 HC ***(refd)***

Devereaux Holdings Pty Ltd v. Pelsart Resources NL & Anor [1986] 4 ACLC 12 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 64, 132C, 148(1), 254

(Suit No: D8-22-1278-07)

For the plaintiff - Rajasingam Gothandapani (Daphne Koo with him); M/s Shearn Delamore & Co

For the defendant - Porres Royan (Edwin Ng with him); M/s Tetuan Shook Lin & Bok

(Suit No: D8-22-1363-07)

For the plaintiff - K Saraswathy (Thavamalar with her); M/s R Rajan & Co

For the defendant - Porres Royan (Edwin Ng with him); M/s Tetuan Shook Lin & Bok

Watching brief - Ng Pei San; M/s Jal & Lim

Reported by Suhainah Wahiduddin

A

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

B **[1]** Parties are agreed both enclosures will be heard together as they arose from the same meeting which the plaintiffs in both cases intend to seek the same restraining order.

[2] As the court has directed that all affidavits must be filed C before 15 December 2007 any affidavits filed after this date will not be considered.

[3] In both the enclosures in the two suits the parties are seeking the common reliefs as follows:

D (a) Perintah untuk menahan Defendan daripada bertindak atas, melaksanakan atau memberikan kesan kepada resolusi yang dikatakan diluluskan semasa Mesyuarat Agung Tahunan ke-24 Defendan yang telah diadakan pada 30.8.2007;

E (b) Perintah untuk menahan Defendan daripada menjual dan/atau melupuskan kepentingan ekuiti Defendan dalam Oriental Capital Assurance Berhad kepada Salcon Berhad dan/atau mana-mana pihak lain sementara menunggu pelupusan tindakan ini;

F (c) Perintah untuk menahan Defendan daripada memasuki, meneruskan dan/atau mencapai persetujuan terhadap perjanjian penjualan saham dengan Salcon Berhad seperti yang dicadangkan dan dikatakan diluluskan sebagai Resolusi 4 dalam Resolusi-resolusi Yang Dicadangkan dan/atau mana-mana pihak lain sementara menunggu pelupusan tindakan ini;

G (d) Perintah untuk menahan Defendan daripada melupuskan, menjual, memindah milik keseluruhan aset MAIKA seperti yang dicadangkan dan dikatakan diluluskan sebagai Resolusi 5 dalam Resolusi-resolusi Yang Dicadangkan;

H (e) Kos terhadap dan berbangkit daripada permohonan ini dijadikan kos di dalam kausa; dan

(f) Sebarang Perintah lanjut atau relief lain yang dianggap suaimanfaat oleh Mahkamah yang Mulia ini.

I **[4]** The grounds are set out in the respective supporting affidavits of the plaintiff: (Enclosures 4 and 5 of D8-22-1278-2007)

Rajannan a/l Ravanaiah A

1. I am the secretary of the Plaintiff. I am duly authorised by the Plaintiff to affirm this affidavit on its behalf.

2. Save as otherwise stated the facts deposed to herein are within my personal knowledge or from the Plaintiff's records B and/or from matters made known to me by the Plaintiff's solicitors, Messrs. Shearn Delamore & Co., all of which I verily believe to be true and accurate to the best of my knowledge.

3. I crave leave to refer to the following cause papers: C

   (a) The Plaintiff's Writ of Summons and Statement of Claim dated 19.9.2007;

   (b) The Plaintiff's summons-in-chambers dated 19.9.2007 ("Injunction Application"); and D

   (c) The Plaintiff's Affidavit In Support affirmed by me on 19.9.2007 ("Plaintiff's Affidavit in Support")

4. I affirm this affidavit in further support of the Plaintiff's Injunction Application. E

5. I now produce and mark as bundle exhibit "RR-17" a collection of photographs taken at the 24th Annual General Meeting of the 1st Defendant ("MAIKA").

6. Of these photographs, those appended to pages 2 to 8 of F exhibit "RR-17" are photographs taken of men who were allowed to remain inside the meeting hall by Tan Sri Datuk Abdul Rashid Bin Abdul Manaff ("Tan Sri Datuk Abdul Rashid") as Chairman of the Statutory Meeting. Almost all of those men were too young to be shareholders. To access G the meeting hall, all they needed was an entrance pass, a photograph of which appears at page 9 of exhibit "RR-17". The photographs at page 11 of exhibit "RR-17" depicts how these men gain access into the meeting hall.

7. The photographs at page 10 of exhibit "RR-17" are that of H a shareholder's proxy, Dr. Letchumanan, who was assaulted and dragged out of the meeting.

8. The photograph at page 2 of exhibit "RR-17" is most revealing. It is a photograph of a man with the figure '8' clearly shaven on the back of his head and bleached for I better contrast. He was seen wearing a MAIKA lanyard and

tag around his neck. He is typical of the many intimidating men that were abound at the meeting. Some of the shareholders, myself included, had protested to Tan Sri Datuk Abdul Rashid as Chairman about the presence of these men inside the meeting hall. It was the likes of them who verbally and physically abused and assaulted me on 30.8.2007. Tan Sri Datuk Abdul Rashid did nothing to restrain those men.

9. I crave leave to refer to paragraph 67.3 of the Plaintiff's Affidavit In Support which I affirmed on 19.9.2007. In further support of the Plaintiff's contention that Plaintiff's Injunction Application ought to be heard *ex parte* first, I now produce and mark as exhibit "RR-18" a copy of the General Announcement dated 28.8.2007 made by Salcon Bhd, the purchaser of Oriental Capital Assurance Berhad, to Bursa Malaysia Securities Berhad. On page 1 of this document there is a disclosure that a Conditional Share Sale Agreement for Oriental Capital Assurance Berhad had been signed as early as 28.8.2007.

S. Nadarajah

1. I am a Management Consultant. I am also a shareholder of the Defendant ("MAIKA"). I subscribed the shares of MAIKA at the initial public offer ("IPO").

2. I have been shown a copy of the following cause papers:

   a) Plaintiff's Writ of Summons and Statement of Claim dated 19.9.2007;

   b) The Plaintiff's Summons-in-Chambers dated 19.9.2007 (Injunction Application);

   c) Plaintiff's Affidavit In Support affirmed by Rajannan a/l Ravanaiah on 19.9.2007 ("Plaintiff's Affidavit In Support"); and

   d) Plaintiff's 2nd Affidavit in Support affirmed by Rajannan a/1 Ravanaiah on 19.9.2007 ("Plaintiff's 2nd Affidavit in Support").

3. I affirm this affidavit in support of the Injunction Application.

4. Save as otherwise stated the facts deposed to herein are within my personal knowledge.

5. I hereby confirm paragraphs 22 and 23 of the Statement of Claim and paragraphs 25 and 26 of the Plaintiff's Affidavit in Support. I further confirm the contents of the Plaintiff's 2nd Affidavit in Support.

6. I confirm that I was assaulted at the Defendant's 24th Annual General Meeting ("the said AGM") on 30.8.2007, dragged out of the meeting hall by men, amongst others, wearing MAIKA lanyards and tags (I identified one of them in my police report) and I was thrown on the floor. I laid there on the floor, outside the meeting hall, dazed and without any medical attention. Now I produce herewith as exhibit "SN-1" photographs to evidence the same.

7. Prior to that I had spoken into a microphone and requested the Tan Sri Datuk Abdul Rashid Bin Abdul Manaff ("Tan Sri Datuk Abdul Rashid"), who was the Chairman of the said AGM, to conduct the said AGM professionally, highlighting amongst others that there are questionable characters following me around at the said AGM. I further requested that unauthorised persons, non-members and outsiders should be excluded from the said AGM as I felt threatened and intimidated by the presence of thuggish individuals for me to exercise my basic rights as a shareholder.

8. At this point, I was dragged by my collar and thrown out of the meeting hall. I was verbally abused and intimidated by a group of persons, including men who were wearing MAIKA lanyards and tags around their necks. Thereafter, I was prevented from re-entering the meeting hall. I was only subsequently allowed to re-enter the meeting hall with the intervention of the police that were present there.

9. Upon re-entering the meeting hall, I related to Tan Sri Datuk Abdul Rashid *qua* Chairman of the said AGM the physical assault and verbal abuse that I had been subjected to. I had further highlighted to him that as he was a senior member of the Bar and an experienced corporate figure, he should fulfil his duties as the Chairman of the said AGM professionally. Tan Sri Datuk Abdul Rashid ignored my request.

10. Tan Sri Datuk Abdul Rashid further took no action as several other shareholders were being assaulted by unidentified individuals, including those who were wearing MAIKA lanyards and tags.

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11. As a shareholder, I aver that I was denied my fundamental rights to discuss, debate, questioning or to propose amendments to, the Proposed Resolutions, in particular Resolutions 4 and 5. As a result of the aforesaid, I aver that my fundamental rights as shareholder was rendered inefficacious and wholly illusory.

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12. I have lodged a police report which is exhibited to the Plaintiff's Affidavit in Support as exhibit "RR-10".

13. I am prepared to give my sworn testimony to this Honourable Court.

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[5] Both the applications are opposed by the defendants in the two suits as set out in their respective affidavits.

[6] Submission By Counsel For The Defendant, Encik Porres Royan

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1. See *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 with respect to principles:

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> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
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> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He

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is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

There is no serious question to be tried in both cases. The plaintiff alleged that he was prevented from speaking and voting at the impugned AGM. Their representative Rajannan was prevented from speaking and voting according to him. This is not true. We relied on the mute evidence as contained

in the photographs that were taken at the AGM showing that Mr. Rajannan is speaking – p. 218 and p. 225 of encl. 28. Page 230 shows press conference after the group walked out and the two photographs showed Mr. Rajannan standing to Dato' Subramaniam's left.

2. See encl. 28 again, para. 23 p. 30, para. 67 p. 46, para. 13.27 p. 23: less than 2% of all those who voted, voted against the resolution. 20% of those who registered did not vote including the plaintiff did not vote. The plaintiffs in the 2nd suit constitute 0.009% of those eligible to vote and this is part of the 20% who did not vote. Even if both plaintiffs had been denied as they claimed of their voting rights the resolutions would still have been carried out by sheer force of the majority. Of the 80% who voted only 2% voted.

3. The court would have to consider whether damages would constitute adequate remedy. The defendant needs the money from the sale of the OCAB shares that it holds to pay off its debt and if prevented from doing so there could be serious irreparable damage namely the defendant could be wound up by the creditor, or a creditor could attach and sell the OCAB shares and thereby causing the defendant to miss the opportunity to sell at the optimum price. See p. 45 paras. 63 to 66 of encl. 28 as consequence if injunction is to remain.

4. Balance of convenience falls in favour of not granting or further withholding this *ex parte* injunction because the vast majority of the shareholders had voted for the sale of the shares and the eventual return of the monies to the shareholders. By the grant of this injunction there would be considerable delay in the return of this money to the shareholders against the plaintiff's right to speak and vote at some reconvened AGM. The proposal to sell the shares requiring endorsement meeting had been sent out to members as early as 15 August 2007 (two weeks before the meeting) together with the notice convening the AGM and the rational of the board recommending the sale in para. 5. These are sufficient for all shareholders to consider before they voted at the AGM.

5. Two weeks before the meeting the defendant had distributed the notice of meeting together with the agenda accompanied by a circular by the board recommending the disposal of the

shares setting out the particulars of the agreement which had been entered with the intended purchaser Salcon detailing the rational for the disposal. In law the board is not required to justify the price at which the shares were to be sold. See s. 132C of the Companies Act 1965. See *Dato Mohd Tahir bin Abdul Rahim & Ors v. Sharikat Permodalan Kebangsaan Bhd & Ors* [1990] CSLR IX (1004). See also *Dato' Toh Kian Chuan v. Swee Construction and Transport Company (Malaya) Sdn Bhd* [1995] 1 LNS 317.

(Not the function of the court to enquire into the price of shares to be sold.)

[7] Submission By Counsel For The Plaintiff, Encik Rajasingam

1. There are two plaintiffs – the first plaintiff holds 625,000 shares in the defendant, the other set of eight plaintiffs hold collectively 20,000 shares in the defendant.

2. The first plaintiff is a cooperative society with approximately 30,000 members. It is also a shareholder in its own right of OCAB (the shares of which the defendant is going to sell to Salcon).

3. At the heart of this case is the interpretation that must be given to s. 148(1) of the Companies Act 1965 which read as follows:

148 As to member's rights at meetings

(1) Subject to subsection (2), every member shall notwithstanding any provision in the memorandum or articles have a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting:

Provided that the company's articles may provide that a member shall not be entitled to vote unless all calls or other sums personally payable by him in respect of shares in the company have been paid.

4. This right of a member of a company is a fundamental right, the breach of which is not merely a procedural irregularity of no consequence. This right in s. 148(1) is not subject to the majority and a breach of this rule cannot be compensated by

damages. See *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 per Edgar Joseph Jr J:

> Looking back, I would emphasize that the right to vote is one of a member's fundamental rights for it is by his vote that he gets his voice heard in the company's affairs. That being so, the submission that even if the proxy Miss Khoo Gaik Tee had not been excluded and had voted at the AGM, the result of the poll would have been the same, having regard to the fact that her principal the plaintiff was only a minor shareholder, is clearly untenable.
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> In these circumstances, the AGM concerned and all resolutions passed thereat being a nullity and therefore incurably illegal, recourse to the validation provisions of either s. 355(1) or s. 355(3) would be an act of supreme futility. Accordingly, the proxy point also failed.

5. The defendant company is not a mere trading company. Its purpose was to secure the economic advancement of Malaysian Indians by increasing their level of participation in the equity ownership of the corporate sector. See prospectus of defendant attached to the IPO (encl. 3 exh. "P3" of the 2nd suit).

6. Balance of justice is in favour of the plaintiff in granting the injunction. The OCAB shares held by the defendant constitutes the core asset of the defendant and therefore the defendant is obliged to seek approval at a general meeting pursuant to s. 132C of the Companies Act 1965 which says as follows:

> **132C Approval of company required for disposal by directors of company's undertaking or property**
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> (1) Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for:
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> (a) the acquisition of an undertaking or property of a substantial value; or
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> (b) the disposal of a substantial portion of the company's undertaking or property,
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> unless the arrangement or transaction has been approved by the company in a general meeting.

(1A) For the purpose of subsection (1), in the case of a company where all or any of its shares are listed for quotation on the official list of a Stock Exchange as defined in the Securities Industry Act 1983, the term 'substantial value' or 'substantial portion' shall mean the same value prescribed by the provisions in the listing requirements of the Exchange:

(a) which relates to acquisitions or disposals by a company or its subsidiaries to which such provision applies; and

(b) which would require the approval of shareholders at a general meeting in accordance with the provisions of such listing requirements.

(1B) In the case of any company other than a company to which subsection (1A) is applicable, an undertaking or property shall be considered to be of a substantial value and a portion of the company's undertaking or property shall be considered to be a substantial portion if –

(a) its value exceeds twenty-five per centum of the total assets of the company;

(b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than twenty-five per centum of the total net profit of the company; or

(c) its value exceeds twenty-five per centum of the issued share capital of the company, whichever is the highest.

(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).

(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

(4) This section shall not apply to proposals for disposing of the whole or substantially the whole of the company's undertaking or property made by a receiver and manager

A of any part of the undertaking or property of the company appointed under a power contained in any instrument or by a Court or a liquidator of a company appointed in a voluntary winding up.

B (5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or thirty thousand ringgit or both.

C (6) In this section, "director" includes the chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called.

D Under s. 132C they must not enter into or dispose of a substantial portion of the company's property without obtaining prior approval at the general meeting. Here in this case the defendant had already entered into a sale agreement to sell the OCAB shares to Salcon without disclosing that it E had done so to the shareholders. Neither was this fact disclosed in the circular, chairman's statement. These documents were circulated two weeks before the AGM (before which the sale of the shares was on the agenda) but the fact that the defendant company had already entered into F the sale and purchase agreement was not disclosed at the AGM. In fact the circular was misleading in that it purports to inform the shareholders that if the AGM gives the approval it would proceed to dispose the 74% equity in OCAB for the sum of RM129,805,536 only and upon the terms and G conditions as set out in the share sale agreement to be entered into between the company with Salcon Berhad. In fact the plaintiff in the 1st suit had before the AGM upon receiving the circular advised the defendant to defer the sale pending a valuation by a merchant banker or an independent H financial consultant with respect to the actual value of OCAB shares and all other assets but there was no response. Therefore the only venue available to the shareholders particularly the plaintiff in the 1st suit was the AGM to put forth its view. See *Dato' Mohd Tahir supra* where the emphasis I is on a fair and reasonably true statement of facts which must be given to the shareholders before they are asked to vote. The fact that the director had recommended the sale of the

land in that case may not be sufficient to meet the requirement of disclosure. See also Supreme Court of New South Wales in *Devereaux Holdings Pty. Ltd. v. Pelsart Resources N.L. & Anor.* [1986] 4 ACLC 12 at held:

1. A resolution of a company may be attacked in relation to a defect in the notice convening the meeting in two separate ways. First, at common law, unless all corporators are present a meeting is only competent to deal with special business which is properly notified to all members in a notice convening the meeting. Secondly there is an equitable principle that it is the fiduciary duty of the directors not to mislead the corporators by providing them with material that is other than substantially full and true.

2. In considering the equitable rule one must ask what effect will the information provided have on the ordinary shareholder who scans or reads the document quickly, not as a lawyer, but as an ordinary person in commerce or an ordinary investor.

The circular which was circulated two weeks before the AGM merely averted to the large debt owed by the company and the necessity to discharge them in order to keep the company.

7. The evidence in support of the breach of s. 148 of the Companies Act 1965 is now as follows:

i) Enclosure 3 paras. 24-50: this enclosure outlines the events that transpired at the AGM.

ii) Enclosure 4 exh. "RR17" which is a collection of photographs depicting the various individuals who attended the meeting. We submit these photographs show the unsavoury characters who are there to intimidate the plaintiff.

iii) Various police reports: 1st police report encl. 3 p. 198, 2nd police report encl. 3 p. 201, 3rd police report encl. 3 p. 203.

iv) Various newspapers reports – encl. 3 para. 40.

8. Whereas the photographs exhibited by the defendant were taken by an employee of a director of the defendant company and therefore not impartial. We have challenged them to produce all photographs and video recording of the AGM. This challenge had not been met.

A 9. There are no official minutes of the AGM put before this court. In any event, please look at exh. "VP34" pp. 196 and 197, "VP33" p. 195, "VP32" p. 193 and "VP31" p. 192.

10. Furthermore the defendant had admitted that non members
B were present in the hall (encl. 34 para. 6).

11. There is an allegation made against the Chairman that he had misconducted the meeting but he has not personally replied to the allegation. Instead the plaintiff's allegation had been denied
C by only a director of the company.

12. Motion for closure of the meeting was made unlawfully because it sought to end all debates on undebated resolutions namely 2, 3, 4 and 5. The motion was moved during the debate of resolution No. 1 itself.
D

13. On balance of convenience:

i. It is true we owned all in all together with the plaintiff in the other suit not more than 0.5% of the paid-up capital
E of the company but this should not be a factor to be taken into account because of the operation of s. 148 as interpreted in *Lim Hean Pin supra*.

ii. In addition to this defendant's record showed an aggregate of 25.8 million shares being held by 1,134 shareholders
F who attended the meeting.

iii. Resolution 4 which is to sell OCAB shares is said to have been approved by 20.7 million shares of persons attending. However of these, 19.5 million shares were held by only
G five individuals namely the chairman through his company, the chairman in his own name, the deponent of the defendant's affidavit, the father of the deponent and a cooperative known as National Land Finance Berhad. Further shareholders holding shares in aggregate of 5
H million shares did not participate in the voting process although present. About 1,000 over shareholders holding an aggregate of 5 million shares did not vote.

14. Balance of convenience falls in favour of granting the
I injunction. If the court at the end of the day finds in favour of the plaintiff that s. 148 fundamental rights had been transgressed by the defendant which cannot be compensated by damages. On the other hand if the court finds that the

injunction ought not to have been granted in the first place, the defendant's loss can be adequately quantified and compensated by damages which would be the difference between Salcon offer and any other subsequent offers assuming they are lower.

15. The withholding of the sale of OCAB shares on the other hand would not affect the company as it is a profit generated investment of the defendant which had generated RM24 million so far for the defendant.

16. The object of the company is not merely profit making but to enhance and increase Indian equity ownership of wealth in the country. See encl. 3 in the 2nd suit exh. "P3" – the prospectus accompanying the Initial Public Offer (IPO).

17. The reason given for balance of convenience falling in the defendant's favour is that if defendant is prevented from selling the shares they would not be able to settle the debt of the company. That would cause irreparable damage and defendant may be wound up. Only two debts were disclosed – one Danaharta and the other CIMB totaling RM18.3 million to CIMB and RM34 million to Danaharta. They are corporate guarantors for Danaharta in respect of the loan taken by the subsidiary. There is no evidence that OCAB must be sold to meet its debt on an urgent basis. There is no evidence to show that the defendant would be adversely exposed to Salcon if the sale is injuncted.

18. Additional cause of action in the 2nd suit. There is a conspiracy between the directors to prevent the plaintiff's shareholders from exercising their rights to speak and vote at the meeting by pulling the back and intimidating the plaintiff's speaker when he attempted to speak.

19. Proposed resolution 5 (for which an injunction is presently sought) put forth at the meeting was meant to voluntarily liquidate and return capital. This cannot be done merely by ordinary resolution as they have done here in encl. 3 p. 65. This constitutes a very serious question to be tried.

[8] Reply By Counsel For The Defendant

1. On the serious question to be tried it would appear from the submission of counsel for the plaintiff that the plaintiff was not given the opportunity to speak and to vote and that there was a closure of the discussion even before the debate on the 1st resolution was completed.

2. We have to look at encl. 28 paras. 11 to 13.20 of the defendant's first affidavit. It is the contention of the defendant in these paragraphs that the plaintiff's allegations were untrue. Each and every resolution including the 1st resolution (the subject matter of the dispute) was called up for discussion. Except for the 1st resolution in respect of which there was a long debate the other resolution there was little if any debate.

3. Paragraph 13.16 of the defendant's first affidavit clearly says as follows: "At this point (while the debate was ongoing and the plaintiff's proxy Rajannan was still in the hall) several shareholders and proxies who were frustrated with the manner in which the Subra faction was disrupting the meeting, invited Tan Sri Rashid Manaff to end the debate on Item 1 of the agenda. One such person was Tan Sri Nijhar (a proxy for Govindamah d/o Nagappan (Membership No. 8937 holding 625 shares)). Tan Sri Rashid accepted the proposal and ruled the debate on Item 1 of the agenda be at an end. He then demanded the poll with respect to this resolution while the plaintiff's proxy Rajannan was still in the hall, but ordered the meeting to proceed with the debate on the other agendas. After the debate the chairman adjourned the meeting for voting. Voting took place by poll after ballot papers were distributed encompassing the resolutions 1 to 5. The scrutineers who were professional accountants from the big 4 supervised the voting and they then produced their reports (exh. "VP24" in encl. 28).

4. Our stand is that Rajannan was given every opportunity to speak and it is only when he wanted to repeat or revisit matters which had already been debated that the Chairman Tan Sri Rashid closed the debate upon request from the floor.

5. It is not a clear case that the plaintiff was denied his right to speak or vote. Indeed there is a serious conflict of evidence with respect to what transpired at the meeting on matters relating to the plaintiff's right to speak and vote.

6. All the eight plaintiffs (by the affidavit of the 5th plaintiff) in the 2nd suit alleged that they were restrained from exercising their rights to speak, to debate and to vote only because they feared for their safety. There was no allegation of being prevented physically as in the 1st suit. The 2nd plaintiff in the 2nd suit despite having given the impression that he could not exercise his voting right without fear had actually voted as his polling paper is exhibited in encl. 34 voting against all five resolutions.

7. See *Lim Hean Pin supra*. The point is this – there is no doubt that in that case the plaintiff's proxy has been excluded from attending the meeting. There was no question the plaintiff's proxy had been excluded from the meeting but in the instant case there is a serious doubt as to whether the plaintiff had been excluded from the meeting.

8. Balance of justice – it is important to contrast the two scenarios:

First scenario: if the plaintiff is granted the interlocutory injunction but fails at the trial;

Second scenario: where the plaintiff is not granted the interlocutory injunction but succeeds at the trial.

In respect of first scenario, as far as this is concerned, the effect of the interlocutory injunction would be to prevent indefinitely the sale of the OCAB shares to Salcon and in all probabilities the agreement would have to be terminated because there are time limits within which the agreement is to be completed. Secondly the defendant is presently insolvent in the sense that it has assets but not liquid cash to pay its creditors. Also the said shares are mortgaged. It is the creditors who decide whether to grant indulgence in terms of time and or amount that has to be paid. Presently the defendant is in jeopardy of being wound up by the creditors for its failure to pay its debts. The said shares which had been charged are at the mercy of the chargee who can force sell them at any time as they are now outstanding. The fate of those shares would have to be decided by others. And in the end the defendant would be the loser.

Second scenario: if the injunction is not granted but the plaintiff succeeds at the trial. The effect of this is in all probability the sale would have been carried through but the plaintiff may have recourse to the company or the directors for damages.

Even if the court is inclined to grant this interlocutory injunction a mere undertaking to pay damages to the defendant in the event that the plaintiff fails ultimately in this suit the plaintiff may not be able to honour the undertaking. The undertaking should be fortified.

[9] Reply By Counsel For The Plaintiff

1. Assuming that the defendant had excess over the liabilities as counsel for the defendant submitted then there is no urgency to sell OCAB shares as forebearance can easily be obtained from creditors.

Findings And Decision

[10] The plaintiff's case is premised on the allegation that:

1. It had been denied fundamental right to speak, propose amendments and vote at the meeting by reason that the person representing it had been subjected to physical abuse, assault and oppression. The person in question Mr. Rajannan was assaulted repeatedly, pushed to the floor and had unknown substance sprayed at him, verbally threatened with obscenities and that he would be harmed after the meeting and whenever he approached the microphone in order to speak he was pounced upon by unknown individuals present in the meeting as a result of which he was disabled and prevented from exercising his rights to speak and to vote on the resolutions in accordance with the mandate from the plaintiff.

2. During the debate of proposal 1 itself to propose the company's account the Chairman had wrongly accepted a motion for closure of all debates from a member present and had proceeded to close all debates. Thereafter the Chairman proceeded to invite members to vote on each proposal without any debate.

3. Resolution No. 5 entitles "proposed distribution of surplus", was in fact a resolution to reduce the capital of the company under s. 64 of the Companies Act 1965 and to voluntarily wind up the company under s. 254. This requires a special resolution.

4. The proposal for the sale of the OCAB shares was not accompanied by a proper valuation by a professional valuer.

[11] The Defendant Disputes The Allegation

1. The Chairman did not deprive the plaintiff's proxy Mr. Rajannan from exercising his rights under s. 148 of the Companies Act 1965. The incident did not happen as Mr. Rajannan described. In fact Mr. Rajannan was given all the opportunities to speak and present his side of the story.

2. There was no closure of motion for all the proposed resolutions. There was only foreclosure motion in respect of motion No. 1 only.

3. Resolution No. 5 was not meant to be a return of capital and voluntary liquidation which the defendant concedes would require special resolution. Resolution No. 5 was tabled merely to seek the approval of the house to undertake the exercise of distributing the surplus and to voluntarily wind up the company at a later stage where the company would then proceed to obtain the requisite resolution as required under s. 64 and s. 254 of the Companies Act 1965.

4. There was no requirement that the valuation report with respect to the value of the shares be provided to members of the company. In this instance the notice of the meeting was accompanied by the Chairman's statement dated 15 August 2007 justifying the proposed sale although no valuation was provided with respect to the fair value at which the shares would be sold.

[12] It is not the function of the court to decide by a contest of affidavits whether the complaints are true. Applying the now well established test in *Keet Gerald Francis*, all that is required of the court at this stage is to determine on an objective basis whether there is a serious question to be tried before proceeding to the next stage to decide on whose side the balance of justice falls.

[13] A serious question to be tried merely means (as what Lord Diplock said in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 at 407) "the court must be satisfied that the claim is not frivolous or vexatious".

[14] I accept the submission of counsel for the plaintiff that under s. 148 of the Companies Act 1965 as shareholder of Maika the plaintiff had an unalienable and absolute right to attend, to speak and to vote at the general meeting convened for the purpose of seeking the approval of members of the company to sell the OCAB shares which must be obtained under s. 132C of the Act.

[15] Putting aside the question of whether the facts as alleged are true for the time being and reserving it for the trial, I am satisfied that there is a serious question to be tried on the legality of the meeting which requires me to proceed to the next stage of considering on whose side the balance of justice lies.

[16] The right to attend, speak and vote at a company meeting under s. 148 has been held in *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 by Edgar Joseph Jr J to be "not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat."

[17] Admittedly His Lordship in that case did not appear to have adopted the two pronged approach as we now do to undertake the balancing exercise of where the balance of justice falls and had allowed the injunction to stand based purely on the breach of s. 148.

[18] On my part taking the next step, I am convinced that the balance of justice lies in favour of maintaining the injunction – for to disallow it would tantamount to condoning an improper and illegal act of the defendant against the legal right of the plaintiff to speak and vote at the meeting.

[19] I can accept as persuasive and logical the submission of counsel for the defendant Mr. Porres Royan that the plaintiff here owns but a very small equity in Maika and that an overwhelming number of other members had voted in favour of selling the shares and therefore the question of whether or not the plaintiff spoke and voted at the meeting would not have caused any loss to the

plaintiff. But the objective of Maika as a company as counsel for the plaintiff submitted is not purely the sale and purchase of stocks and shares for profit. Its objective as stated in its prospectus is to "foster, promote, advance and secure inter-communal economic cooperation and coordination, in keeping with the guidelines of the New Economic Policy of the Government of Malaysia and in particular to secure the economic advancement of Malaysians of Indian and Ceylonese origin by increasing their level of participation in the equity ownership of the corporate sector."

[20] The sale of the shares is but a means to the fulfilment of the objective and for that reason a debate on the pros and cons as to whether they should be sold was of paramount importance. It would afford the dissenting member no matter how insignificant his holding is to put forth his view and to enter into an open discussion on the merits and demerits of the proposed sale and possibly to explore other ways and means to overcome the debt problem of Maika.

[21] A denial of the right of the plaintiff to speak and vote if proven under the circumstances constitutes a breach so fundamental that overrides all other considerations that the defendant may be able to advance in favour of discharging the injunction.

[22] There shall be accordingly an order with the usual undertaking as to damages as follows:

1. An order to restrain the defendant from acting on, implementing or giving effect to the resolutions purportedly passed at the defendant's 24th Annual General Meeting held on 30 August 2007;

2. An order to restrain the defendant from selling and/or disposing the defendant equity interest in Oriental Capital Assurance Berhad to Salcon Berhad and/or any other party pending the disposal of the action;

3. An order to restrain the defendant from entering into, proceeding with proceeding and concluding a share sale agreement with Salcon Berhad as proposed by resolution 4 of the proposed resolutions and/or any other party pending the disposal of the present action;

A 4. An order to restrain the defendant from disposing, dissipating, selling and/or transferring the entire assets of the defendant as proposed and purportedly passed as resolution 5 of the Proposed Resolutions.

B **[23]** The order shall be in force until the disposal of this suit or until such time as the court may direct.

[24] The plaintiff shall be entitled the costs of this application.

[25] As agreed between the parties the same order will apply to C encl. 4 of D8-22-1363-2007.

[26] It is to be appreciated that the injunctive order would if allowed to take its normal course will only be discharged when this suit is disposed of probably sometime next year. There is therefore D an urgent need for the parties to work out an agreement to settle their differences over the sale of OCAB shares. As I see it the dispute is by no means insurmountable. It seems to me that the plaintiff's grievance lies only in it being denied its right to speak at the meeting in order that its views with respect to the sale of the E shares be heard and thereafter to vote.

[27] The defendant shall therefore be at liberty to convene another meeting to bring about a settlement of their differences. It would be advisable in view of the difficulty in conducting the F meeting that it be properly supervised by an independent body to be agreed upon by the parties and that a proper valuation by a qualified person be used to determine the value of the shares that Maika intends to sell.

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